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Notes

Bias Crimes: Unconscious Racism in the Prosecution of “Racially Motivated Violence”

Tanya Katerí Hernández

*After being attacked by a gang of whites and in turn being blamed by police investigators, Rafael Gonzalez attempted to commit suicide because of his fear of walking the streets where his attackers continued to walk freely and he was blamed for his own victimization. . . . Rafael did not want to live in a world where his pain was not recognized.**

Within the past four years, a perceived surge of “bias crimes” has seized the nation’s attention. Bias crimes, physical acts of violence used as an outlet for prejudiced hostilities, are usually street crimes spontaneously committed by casual clusters of “normal people on the street” with very little advanced planning. This Note focuses on the physical injuries to persons that result from bias crimes. Such physical injuries represent cognizable harms that can be redressed through criminal statutes.¹

Although there are no accurate data on the number of bias crimes committed each year, every national indicator shows that violence against individuals based on their race, ethnicity, and sexual orientation is increas-

* Puerto Rican Legal Defense & Education Fund, Testimony Presented to the Committee on International Intergroup Relations and Special Events of the New York City Council 2-3 (Oct. 21, 1987) (unpublished manuscript available from Puerto Rican Legal Defense & Education Fund, N.Y., N.Y.) [hereinafter Testimony].

1. Other forms of violence such as arson, vandalism, and verbal harassment, whose harms are no less serious than physical injuries, are beyond the scope of this Note.

ing.² Three thousand acts of bias-related violence were documented nationwide between 1980 and 1986.³ For example, the Puerto Rican Legal Defense & Education Fund has seen a marked increase in racial violence (hate crimes or bias crimes) against Latinos, to a point where it now receives an average of two calls per week about such incidents.⁴ More than one in five gay men and nearly one in ten lesbians have been physically assaulted because of their sexual orientation.⁵ As such statistics indicate, the term commonly known as "racially motivated violence" is not quite accurate in as much as such bias-related violence extends to discrete groups other than racial minorities.⁶

The pervasive recognition that racially motivated violence is on the rise has led the House of Representatives to direct the Justice Department to begin collecting and publishing statistics on the incidence of these crimes.⁷ Civil rights organizations have lobbied on behalf of bias crime victims for the maintenance of consistent and accurate statistics in order to persuade state prosecutors to treat the increase in bias crimes as a serious problem.

This Note is based on the premise that bias incidents more often than not elude prosecution. The number of prosecutions has not increased at the same rate as reported incidents of bias-related violence. For example, in 1988, in New York, a city with chronic and highly publicized bias crime, only thirty-three bias crimes were prosecuted out of the estimated 800 incidents that were brought to the attention of the New York City Bias Unit.⁸

This Note focuses on the need for carefully drafted state statutes directed against bias crime, and in particular on the need for statutes that encourage prosecutors to prosecute. Part One will show the need for stat-

2. See, e.g., CRIM. JUST. NEWSL., June 15, 1988, at 3 (30 state attorneys general note that all national indicators show violence against individuals based on race increasing).

3. States News Service, Jan. 14, 1988 (LEXIS, Nexis library, Omni file) (citing CENTER FOR DEMOCRATIC RENEWAL, THEY ALL DON'T WEAR WHITE SHEETS (1988)).

4. Testimony, *supra* note *, at 1.

5. NATIONAL GAY & LESBIAN TASK FORCE, DEALING WITH VIOLENCE: A GUIDE FOR GAY AND LESBIAN PEOPLE i (1986).

6. Although this Note specifically discusses the problem of racially motivated violence, it uses the term "race" to represent all discrete groups that are subject to threats of physical violence because of a common and particular characteristic that is so much a part of their being that the violence cannot be avoided by simply attempting to negate that characteristic. More specifically, this Note considers violence committed because of ethnic background, sexual orientation, religion, color, ancestry, or language. This Note's analysis selects race as representative because of the well-known and long history of persecution Black people have suffered due to their immutable characteristic. One premise of this Note is that all forms of arbitrary hatred are inextricably connected and that a bias crime against a white gay male is also a bias crime against every member of any discrete and disfavored group.

Although violence against white women could also be included in this study, the history of women's oppression is such that it demands a fuller analysis than could be done within the scope of this Note.

7. See CRIM. JUST. NEWSL., *supra* note 2.

8. Interview with John Fried, Chief of Trial Division within New York County District Attorney's Office, in New York City (July 20, 1989); Telephone interview with Police Officer Walls, New York City Bias Unit (July 20, 1989) (most incidents are deemed prosecution-worthy cases by the police because in their experience, disfavored group community members do not make frivolous claims about such attacks).

utes specifically addressing bias-related violence at the state level, by pointing out the limitations of the Federal criminal and civil rights statutes. Part Two will discuss current state criminal statutes and their efficacy, and will demonstrate that most of these statutes leave too much discretion to the prosecutor, with the result that such crimes are not likely to be prosecuted. Part Two will then set forth an argument justifying the reduction of prosecutorial discretion in a model statute, by showing how both unconscious racism and the involvement of the police in bias-related incidents make bias crime an area that is uniquely affected by prosecutorial discretion. Part Three will explain the elements of a proposed model state statute and set forth the statute.

I. INADEQUACY OF FEDERAL STATUTES AS CAUSE FOR STATE STATUTES

The current level of bias-related incidents of violence demands that state statutes supplement already existing Federal racial violence statutes. Federal statutes are only equipped to confront conspiracies of extremist group violence, epitomized by the tactics of the Ku Klux Klan or neo-Nazi groups, not the scattered racial violence that suddenly erupts in urban settings. But increasingly, bias crimes are being committed by people with no Klan-like affiliations. This means that it is "average Americans," not organized racist extremists, that are now committing these crimes.⁹ These average North Americans must be corrected through the criminal justice system *before* their hatred channels them into paramilitary organizations and the Ku Klux Klan becomes a legitimate political party, and not the aberration society now considers it to be.¹⁰

An examination of Federal statutes points to significant shortcomings in the legislative scheme. The principal Federal criminal and civil statutes that can be applied to private racially motivated violence are respectively 18 U.S.C. § 241, "conspiracy against rights of citizens," and 42 U.S.C. § 1985, "conspiracy to interfere with civil rights." These statutes state in part that a crime has been committed when "two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States";¹¹ or when:

9. Kellner, *The Ku Klux Klan: Our Neighbors to the Radical Right*, 6 PHILADELPHIA SCAN 28, 30 (1988) (people who have never affiliated with KKK starting to express strong support for goals of organization).

10. See Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103, 117 nn.108-09 (1984) (Gallup polls show increase over past 10 years in number of persons who approve of Klan activities; increase also evidenced by major party congressional nominations of avowed Klan and Nazi members).

11. 18 U.S.C. § 241 (1982).

two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.¹²

In order to apply these Federal statutes, the prosecutor would first have to establish that there was a conspiracy, and then that the conspiracy was motivated by a desire to interfere with rights that are protected by the Constitution or Federal law. The difficulty of fitting arbitrary racial violence into the realm of interferences of constitutional magnitude has led to very selective enforcement of the statutes. This selective enforcement fails to address the pervasiveness of spontaneous violence. Federal criminal statutes help to vindicate the injuries¹³ when a victim has been physically harmed at a voting booth, but not necessarily when that same person wants to walk without fear in an all-white neighborhood.¹⁴

The solution to the problem of bias-related violence lies in state statutes specifically drafted to redress this harm, rather than in the more general conspiracy focused statutes at the federal level. Federal statutes are not tailored to address the spontaneous violence caused by unconscious and conscious racism. Although Federal conspiracy statutes could be an aid to states in prosecuting and attempting to deter bias crimes, such Federal statutes cannot make as strong a statement as state criminal statutes directed specifically at bias violence.

The harm which arises from bias crimes is distinct because an entire disfavored and discrete group of people is assaulted whenever an individual is assaulted as a result of an immutable characteristic. Communal harmony within society in general is totally disrupted by a single act of arbitrary hatred because of the distrust and fear that is ignited. What is needed is public recognition of these distinct and serious harms, to be achieved through separate state criminal statutes that make an official statement that bias crimes will not be tolerated. The next section will show that state statutes, as currently drafted, also fail to address the problem of bias crime.

II. EFFICACY OF STATE STATUTES

Several states have attempted to confront the problem of increased incidence of bias crimes with a variety of statutes. These states include Cali-

12. 42 U.S.C. § 1985(3) (1982).

13. See Comment, *supra* note 10, at 116 (suggesting that Federal statutes can operate as backup for failure to prosecute racial violence on state level until states make up for deficiencies in enforcement).

14. See N.Y. Times, Aug. 30, 1989, at B4, col. 3 (Yusef Hawkins, Black 16-year-old, killed when he walked into predominantly white neighborhood of Bensonhurst, Brooklyn, to look at used car for sale).

ifornia, Connecticut, Idaho, Illinois, Massachusetts, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Washington, and West Virginia.¹⁵ What is most significant about the statutes, in general, is that they do not consider the greatest obstacle to their enforcement—the power of unmonitored prosecutorial discretion.¹⁶

The statutes appear to fall in two general categories,¹⁷ but the distinction is not relevant to the focus of this Note. The first category of statutes¹⁸ contains provisions that emulate federal civil rights legislation that requires perpetrators to have interfered with a right secured by the Constitution or by law. The Massachusetts statute is representative of the language used in this category of statute:

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the Commonwealth or by the Constitution or laws of the United States.¹⁹

The second category of statutes focuses on physical injury as a method of intimidation or harassment.²⁰ Category two statutes have language similar to that in the Oklahoma statute:

No person shall maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, national origin or disability . . . [a]ssault or batter another person²¹

Unlike any other state, the California statute²² covers discrimination based on sexual orientation. In general, these statutes only enumerate race, religion, and national origin as criteria for inclusion within their provisions.

15. The Pennsylvania statute only deals tangentially with the physical injury focus of this Note because it is a regulation against property destruction. See *infra* notes 18-21 and accompanying text.

16. See *infra* Part II.B. (discussion of prosecutorial discretion).

17. This Note will not discuss the possibility of an action in tort for the intentional infliction of emotional distress. Civil actions complicate criminal prosecutions because the financial interest in the outcome of the criminal case creates an avenue of attack on the victim's credibility. Criminal statutes better address the unconsciously racist prosecutorial presumption that bias crime victims are not credible. Interview with Marlene Besterman, Assistant District Attorney with the New York County District Attorney's Office, in New York City (July 12, 1989).

18. CAL. PENAL CODE § 422.6 (West 1988); CONN. GEN. STAT. ANN. § 46a-58 (West 1986); MASS. GEN. LAWS ANN. ch. 265, § 37 (West Supp. 1988); N.D. CENT. CODE § 12.1-14-04 (1985); W. VA. CODE § 61-6-21 (1988).

19. MASS. GEN. LAWS ANN. ch. 265, § 37 (West Supp. 1988) (emphasis added).

20. IDAHO CODE §§ 18-7901 to 7903 (1987); ILL. ANN. STAT. ch. 38, para. 12-7.1 (Smith-Hurd Supp. 1989); N.Y. PENAL LAW § 240.30 (Consol. 1984); OKLA. STAT. ANN. tit. 21, § 850 (West Supp. 1988); OR. REV. STAT. § 166.155 (1987); R.I. GEN. LAWS § 11-42-3 (Supp. 1988); WASH. REV. CODE ANN. § 9A.36.080 (1988).

21. OKLA. STAT. ANN. tit. 21, § 850 (West Supp. 1988).

22. CAL. PENAL CODE § 422.6 (West 1988).

Although bias-crime statutes may call prosecutors' attention to the magnitude of the problem, their mere existence on the books is not enough. Evidence of the inadequacy of the current statutes may be found in the fact that the few cases²³ that have been reported under these state statutes have not involved the sudden and arbitrary physical attacks which are continuously being recorded by various civil rights organizations.²⁴ Even if the statutes have been enforced by prosecutors more frequently than is shown by the cases which are selected for reporting, the dearth of reported cases is itself an indication of a low bias crime enforcement record. During the years since the current statutes were first enacted, over three-thousand acts of bias-related violence were documented nationwide.²⁵ None of the thirty-three cases chosen for prosecution in New York City in 1988 were prosecuted under the bias statute.²⁶

Clearly, these statutes are not an adequate solution to the problem. Indeed, it is possible that such statutes, when properly drafted, could provide at least a partial solution: "Racial and religious violence persists in part because existing state legislation, and state court systems fail to adequately deter and punish perpetrators of these crimes."²⁷

The lack of reported cases, contrasted with the surge in reported incidents, leads to the conclusion that state statutes are not being enforced against bias crimes. The following sections will examine several explanations for this apparent lack of enforcement.

Existing state statutes are deficient because they do not address the real problem with bias crime statutes—the lack of enforcement. There are three possible explanations for this lack of enforcement: the exclusion of disfavored groups other than Black Americans from statutory protection; unmonitored prosecutorial discretion; and the related problem of unconscious prosecutorial racism. Unmonitored discretion, coupled with unconscious racism and lack of explicit inclusion of other disfavored groups in the statute, allows prosecutors to: ignore bias crimes; not consider them serious enough for full enforcement; or refuse to realize that many discrete groups are subject to the same bias attacks as are Blacks.

23. See, e.g., *Commonwealth v. Stephens*, 25 Mass. App. Ct. 117, 515 N.E.2d 606 (1987) (home of Cambodian families in community damaged after verbal harassment); *Commonwealth v. Poor*, 18 Mass. App. Ct. 490, 467 N.E.2d 877, *review denied*, 393 Mass. 1103, 470 N.E.2d 798 (1984) (community members damaged home of Black family in neighborhood); *State v. Harrington*, 67 Or. App. 608, 680 P.2d 666, *review denied*, 297 Or. 547, 685 P.2d 998 (1984) (abusive language spoken with intent to harm not exception to State Constitution guarantee of freedom of expression).

24. See *supra* text accompanying notes 2–5.

25. See *States News Service*, *supra* note 3.

26. Interview with John Fried, *supra* note 8 (most bias cases dealt with anti-gay incidents, and since sexual preference is not covered under protected groups of statute, incidents can only be charged as "violations"—hence decision to charge only regular assault that has misdemeanor or felony sentence possibility).

27. Comment, *supra* note 10, at 104–05.

A. *Inadequate Coverage*

The current statutes are inadequate because they fail to include members of other discrete groups, such as gay men and lesbian women,²⁸ who are often targets of bias crimes. The lack of inclusion ignores the dangers of bias crimes for all discrete groups. If bias crimes against all people of color could miraculously be eradicated, the acceptance of bias crimes against people of the Jewish faith would still pose a threat to the safety of people of color; because a bias crime is not only an action of oppression against targeted groups, it is an action based on illegitimate categorizations. The acceptance of expressions of hatred based upon one kind of illegitimate categorization can only encourage further illegitimate categorization.²⁹

Such acceptance of illegitimate categorizations engendered by bias crimes is directly analogous to the concept of racialism (racial ways of thinking) considered dangerous in anti-discrimination law.³⁰ When criminals undervalue a person's life because of racist or sexist ways of thinking, the illegitimate manner of categorizing that person becomes dangerous to all discrete group members, whether they are Black or gay. The statutory omission of many discrete groups whose members are likely to be victims of bias crimes translates into state acquiescence toward bias crimes against those groups' members, which in turn undermines the deterrence value of the statute for all bias crime victim groups.

B. *Prosecutorial Discretion*

Unchecked prosecutorial discretion—completely overlooked in the current statutes—is another explanation for the lack of enforcement of state statutes. The current statutes lack a mechanism for pressuring prosecutors to exercise their discretion carefully, rather than to maintain a policy of non-prosecution for politically unpopular bias crimes. The lack of a pressure mechanism is what accounts for the non-enforcement and undermining of the statutes.

Prosecutorial discretion affects the prosecution of bias crimes to a greater extent than other areas of the criminal law for two major reasons: First, prosecutorial dependence on the police keeps prosecutors from in-

28. See *supra* notes 6 & 22 and accompanying text.

29. See *Civil Rights Commission Examines Anti-Asian Activity*, PR Newswire, July 25, 1986 (resentment against economic prosperity of group of newly arrived Asian immigrants motivates attacks upon diversity of Asian ethnic groups already established in the community). Such attacks in part stem from the "they all look alike" syndrome, where a Black or Asian individual is mistaken for another Black or Asian person who looks nothing like her. See Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 341 n.100 (1987).

30. See generally Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986) (underscoring racialism operates to disadvantage of Blacks, such as when concept that separate races should be maintained in society leads to unequal opportunities).

vestigating the many cases of bias crimes which are raised against police officers; second, the unconscious racism of the prosecutors themselves affects prosecution.

One factor which accounts for the disparate effect of prosecutorial discretion on bias crimes, as opposed to other crimes, is that many of the perpetrators of bias crimes are police officers. Local prosecutors are understandably reluctant to prosecute the police officers on whom they depend in order to function.³¹ This is not a new problem. Within the context of federal and state police brutality cases, "U.S. attorneys . . . have *consistently* opposed . . . prosecution . . ."³² But this reluctance to prosecute police is not without effect on the public at large and in particular, on members of disfavored groups. "[T]he fact that police officers are rarely tried on civil rights charges has led the public to believe that few serious charges are ever made, and has reinforced the belief among offending peace officers that they may treat or mistreat Negroes as their whims direct them."³³ Prosecutors' reluctance to investigate police officers in general police brutality cases arguably increases when victims are members of discrete groups and unconscious racism becomes a factor of prosecutorial inaction.

C. *Unconscious Racism in Prosecution*

The unconscious racism of prosecutors is more of a danger in bias crime prosecution than in the enforcement of other statutes because the premise of bias crime statutes is that racial motivation makes a physical injury more harmful. In order to enforce the statutes, prosecutors must be willing to recognize illegitimate motivation. Unconscious racism, ingrained in North American culture, makes it difficult for prosecutors to concede that racially-motivated violence is indeed a crime.

This Note does not assume that prosecutors typically act in bad faith when bias crime investigations arise, even though many civil rights attorneys believe that is the case.³⁴ Even though bad faith prosecutorial inac-

31. For an example of such reluctance, see Latino Coalition for Racial Justice, Press Release (Feb. 29, 1988). See also *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968) (Black defendant harassed by two police officers and prosecutor who later offered not to enforce two trumped-up traffic offenses if defendant promised not to initiate complaint against officer's misconduct).

32. Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1311 n.64 (1965) (emphasis added) (quoting U.S. COMM'N ON CIVIL RIGHTS, REPORT 64 (1961) (Book 5)).

33. MISSISSIPPI ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, ADMINISTRATION OF JUSTICE IN MISSISSIPPI 25 (1963).

34. Telephone interview with Jose L. Morin, Revson Fellow Professor at the City College of New York Center for Legal Education & Urban Policy (Nov. 28, 1988) (consistent and systematic cover-up occurs in all cases of bias crime involving white civilians and police officers as defendants; cover-up is part of criminal justice system's built-in bias against people of color and prosecutors' desire to maintain cooperation of police force with whom they must work on regular basis).

tion can be a problem, the phenomenon of unconscious racism is more subtle and therefore more dangerous.

Unconscious racism allows many prosecutors not to treat racial violence as a serious crime or consider its victims true victims. One commentator explains: "The social construction of victimhood rests in large measure on the problem that some theorists would call rests in large measure on the problem that some theorists would call 'difference'—here, the inability of the dominant culture to understand as victimhood anything not likely to happen to its members."³⁵ For example, local prosecutors often dismiss bias crimes as "pranks" and in that manner justify sparse investigation.³⁶ When prosecutors classify bias crimes as mere "pranks," they are unconsciously taking illegitimate factors (like race) into account—as is done in racialist decision making.³⁷ Racialism can be defined as the belief that "racial categorizations, even oppressive ones, might be acceptable as long as a case can be made for rational fit between ends and means."³⁸ Because people of color and gay people are marginalized in society, the thinking goes, the victimization of members of such marginalized groups is not accorded the same level of gravity as the victimization of others. The theory of racialist decision making recognizes that this way of thinking can become part of a person's rational decision making process, and is not always a purposefully discriminatory plan.³⁹

The traditionally unreviewable discretion of prosecutors can thus result in systematic, though unintentional, discrimination.⁴⁰ Empirical evidence supports this hypothesis. Research on the death penalty has shown that prosecutors are more rigorous in their investigation of cases involving white victims than they are of cases involving Black victims.⁴¹ Attacks on disfavored and oppressed peoples do not have the same effect on the bu-

35. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 421 n.3 (1988).

36. Comment, *supra* note 10, at 116.

37. The term "racialist decisionmaking" is unique to Professor Carter's work. See Carter, *supra* note 35. Nonetheless the concept of racialist decisionmaking is one that has developed generally through the body of work on race and the legal system. See, e.g., Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1019 (1988) ("cognizance of the frequency with which racial stereotypes alter judgment should influence how 'stark' a statistical disparity must be to raise a presumption of a race-based decision, particularly where . . . noninvidious explanations have been exhausted"); Lawrence, *supra* note 29, at 355–58 (proposing new test to trigger judicial recognition of race-based behavior; "Cultural Meaning Test" would interpret unreasonableness of articulated nonracial criteria as evidence of the racial meaning of defendant's action or violence); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1547 (1988).

38. See Carter, *supra* note 35, at 431.

39. *Id.* at 434 ("millions of tiny, individual, racialist decisions are made each day, and are justified, in the minds of most of the decisionmakers, not on the ground that they oppress, but on the ground that they are rational.").

40. See Noll, *Controlling a Prosecutor's Screening Discretion Through Fuller Enforcement*, 29 SYRACUSE L. REV. 697, 699 (1978).

41. Cf. Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985) (compilation of empirical research demonstrates more thorough investigation of crimes with Black defendants and white victims than of crimes with white defendants and Black victims; these research results were used in the challenge to death penalty as racially discriminatory in *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

reaucratic and political system as does the attack of a white victim. An attack on a white victim is perceived as more threatening by politically powerful groups that keep prosecutors in office. Even if a prosecutor never explicitly focuses on race, the concern with exerting the most energy on cases that the electorate favors allows racism to enter into the legal system. "[R]egardless of the race of the defendant, prosecutors may consider White victims more credible than [B]lack victims or their troubles more worthy of full prosecution."⁴²

There has also been a suggestion that there may be a greater tendency among prosecutors to accept the decisions of minority assault victims to forego prosecution rather than those of white assault victims.⁴³ Unconscious racism plays such a large role in the perpetuation of bias crimes that the oversight of its effect on prosecutorial discretion completely undermines the enforcement purposes of the statutes.⁴⁴ Commentators who blame the lack of enforcement of bias crime statutes on other factors—such as the requirement of proof beyond a reasonable doubt and the ambiguous understanding of what constitutes racial motivation as an element of meeting the burden of proof—miss the point.⁴⁵ The problem is not in adjudication; once bias crimes reach the adjudication process, media attention compels prosecutors to handle the cases professionally and to overcome the burden of proof swiftly. The real difficulty lies in compelling prosecutors to bring these cases forward in the first place. Prosecutorial discretion forms an integral part of the criminal system. But

42. *Id.* at 616 (emphasis omitted) (quoting Myers & Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 447 (1979)).

43. F. MILLER, PROSECUTION: THE DECISION TO CHARGE 175-76 (1969).

44. Unregulated prosecutorial discretion has such a strong potential for allowing unconscious racism to enter the legal system that it has been suggested that selective downgrading of crimes with Black victims and White defendants constantly occurs. *See Developments in the Law—Race and the Criminal Process*, *supra* note 37, at 1547 ("unique potential of unconscious racism imperceptibly to affect prosecutorial decisionmaking justifies a standard more receptive to statistical evidence as proof of discriminatory motive in the context of racial selective prosecution"). This Note will not delve into issues of discriminatory selective prosecution from the perspective of the defendant, because its focus is on compelling prosecution on behalf of victims who are wrongfully neglected. Of course, the same forms of unconscious racism may account for bias crime victims being overlooked and minority criminals receiving harsher sanctions.

45. *See Note, Combatting Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270 (1988). The author recommends that racial motivation be completely removed from state bias crime statutes as an element of the offense by presuming that any physical assault between a white perpetrator and a Black victim is racially motivated. Such a presumption totally weakens the premise that bias crimes are more malicious because of the specific intent involved and therefore more harmful than other crimes which may occur in a racially mixed setting. The presumption makes the statement that everyone in the world is racist. Not only is that an overly broad and harsh assessment of the reality of North-American race relations, it equates prejudice with racism. This Note defines prejudice as the baggage of prejudgments and stereotypes each individual carries when meeting a person of a different background. Racism is the translation of that prejudice into statements or actions which harm those same people of different backgrounds. Placing everyone in the same category is not effective in punishing those individuals who cause the actual physical harm. Although universal prejudice is harmful, a criminal statute which seeks out social deviants to punish is not the most effective way to address the problem of universal prejudice.

when factors underlying prosecutors' discretion lead to an unjustifiable bias toward non-enforcement, such tendencies should be corrected.

III. POLICY PROPOSAL FOR MODEL STATE STATUTE

The inadequacy of state bias crime statutes—especially their failure to address the very real problem of prosecutorial discretion—demands a new approach to dealing with bias crimes that takes into account the entire judicial process. Given that the greatest obstacle to bias crime prosecution is the unconscious racism that causes prosecutorial inaction, the most efficient means of checking the abuse of prosecutorial discretion is to create a statutory regime in which prosecutors are monitored, victims are given standing to challenge inaction, and judges are permitted to review cases of biased prosecutorial methods. The most important elements of such a model statute are discussed below.

A. *Bias Reporting Agency*

A model bias crime statute should establish an independent Bias Reporting Agency (BRA) to aid in regulating prosecutorial discretion. Unlike several bias divisions which are connected to police departments or state's attorney offices,⁴⁶ the BRA would be a separate administrative agency with investigatory powers, and its chair would be appointed by the Governor. The Governor would also appoint a board of ten directors from among the community's active civil rights leaders and attorneys.

The BRA would report to, and be directly responsible to, the Governor. The BRA board would in turn hire attorneys to staff the agency based upon merit and commitment to civil rights issues. As an administrative agency funded by the state government, the BRA would have access to the state's central computer database containing all reports of bias crimes. As soon as the police entered reports of bias crimes into the computer, those same reports would be available to the BRA. Such a centralized computer system would aid the BRA in performing its role as a watchdog agency and advocate of victims' rights. In addition, victims would be able to report attacks directly to the BRA. These reports would allow the BRA to investigate bias crimes committed by police officers.

The BRA would thus overcome the problem of prosecutorial reluctance to act. First, the BRA's attorneys would avoid the close working relationship with police officers that prevents prosecutors from acknowledging

46. In order to function, bias-reporting agencies must be independent of state and municipal police forces or prosecutors' offices. A lack of independence can lead to corruption. In New York State, for example, police officers make up a major part of the Bias Unit and the Civilian Complaint Review Board that investigate police brutality allegations. Telephone Interview with Jose L. Morin, *supra* note 34 (lack of independent source of investigation makes cover-up of bias crimes internally systematic; cover-up also transferred from corrupt units to prosecutors' offices due to lack of independence).

them as bias crime perpetrators. Second, focusing solely on bias crimes would help the BRA attorneys ferret out any of their own prejudices against victims; daily contact with victims and committed members of the staff cannot help but influence and educate the ignorance that informs bias. Third, staffing the BRA with civil rights attorneys who have a special commitment to the bias crime area would counterbalance any institutionally inherent reluctance to act.

1. *Justification of Prosecution Decisions*

To accomplish its purpose, the statute should institute a mandatory justification process for plea bargaining or failure to prosecute in bias crimes cases. The BRA would accordingly require and review written justifications for failures to prosecute, and thereby encourage prosecutors to enforce the statutes more vigorously. The articulation of legitimate reasons for decisions not to prosecute would also help to create public confidence in the prosecutor's performance of her duties.⁴⁷ In addition, this process might produce greater consistency in charging decisions by encouraging prosecutors to consider cases carefully. Public accountability would be enhanced, and those aggrieved by decisions not to prosecute would have an easier time mounting a challenge. The burden of preparing a written justification for a plea bargain or failure to prosecute would be insignificant compared to the benefits of increased prosecutorial accountability.

2. *Helping Victims Seek Judicial Review*

The BRA would aid victims who want to challenge a decision not to prosecute.⁴⁸ Israel administers a similar challenge process. There, prose-

47. See Ashworth, *The "Public Interest" Element in Prosecutions*, 1987 CRIM. L. REV. 595, 605.

48. Traditionally, courts base their refusal to compel prosecutors to file charges on standing grounds. See Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing An Ideal*, 49 GEO. WASH. L. REV. 659, 710-11 (1981). In suits to compel prosecution, as in other litigation, a party has standing if she has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). But as victims have become more alienated from the criminal justice system, fewer people tend to report crimes and fewer still find any advantage in cooperating with prosecutors. To address these problems, the Federal government instituted the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. §§ 1512-1515 (1988)). The Act establishes a greater role for victims in the criminal justice system. Prosecutors are required to consult victims during various phases of the prosecution, including plea bargaining sessions. Most important, the prosecutor submits a "victim impact" statement to the court. This consists of a written statement by the victim informing the court how the crime affected her and how she views the terms of a negotiated plea agreement. Legislation like the Federal Victim and Witness Protection Act is evidence that the victims' rights movement has had such an impact that state courts will now be more receptive to a bias crime victim's challenge to nonprosecution.

Currently, there are a few states in which a victim has a clear right to bring a criminal action in minor offenses. Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117, 151 & n.112 (1984). Commentators recognize that victims should play a greater role in prosecutions. The main reason for giving victims standing to challenge nonprosecution is that, especially in the bias crime context, they have a unique knowledge of

cutors must notify the complaining party in writing of their reasons for not prosecuting. The complaining party may then seek review of the decision with the Attorney General, an official comparable to the U.S. Solicitor General.⁴⁹

This Note proposes a variation on the Israeli system. With a written justification in hand, the victim could ask the BRA to undertake an additional investigation into her case. After investigating the facts, the BRA would *advise* the victim whether it would be prudent for her to seek judicial review of the prosecutor's decision.

Although the BRA would play an instrumental role in aiding the victim, only the victim or a proxy victim⁵⁰ may actually activate the challenge process. Because victims of bias crimes on the whole are disproportionately poor and without bargaining power,⁵¹ merely giving them the right to challenge prosecutorial inaction would be meaningless without also providing the means to exercise that right.⁵² One of the BRA's functions is to serve as the means by which victims can exercise the statutory right to challenge prosecutorial decisionmaking and pressure prosecutors into action.

the facts and an interest in diligent prosecution. See Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 225 (1955). In addition, private citizens should have input into determining what the public interest actually is: "[W]hat is in the 'public interest' is both a complex judgment and an important one Its importance indicates a need for accountability and consistency. The case for accountability is particularly strong because of the profound effect and even the finality of some prosecution decisions" Ashworth, *supra* note 47, at 605. With the risk of unconscious racism entering into decisions of non-prosecution in the bias crime context, it is especially important that victims as representatives of the general population have an input into what constitutes the public interest. Granting victims standing could be regarded as a check on the worst excesses of prosecutorial discretion—specifically, the use of "administrative convenience" as a pretext for selective indifference to the victims of bias crimes. Thus, given the devastating effects of bias crimes, as discussed in Part One, and given that Federal victims' rights legislation has laid the groundwork for states to adopt similar legislation, courts should grant standing to victims of bias crime.

49. See Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 48-49 (1971).

50. See Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 559 (1982) (where provided for by statute, public interest groups may assume role of proxy victim for purpose of "attending to the criminal law enacted out of concern for their constituents"). In order for victim-initiation of prosecution to be an efficient check on prosecutorial discretion, civil rights organizations should be able to serve as proxy victims. Proxy victims attend to the criminal law out of concern for their constituents. This claim to intervention on the part of civil rights organizations is especially powerful when one considers both the widespread impact of a single bias crime on an entire community and the harmful impact on other members of the disfavored group. See also *Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) (dictum) ("The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the [standing] requirements of Art. III may be met.").

51. Telephone Interview with Jose L. Morin, *supra* note 34 (bias crime victims are typically very vulnerable population that would not benefit from private prosecution option requiring disposable income).

52. For those victims who are already socially disadvantaged, the BRA may appear to be an overly burdensome bureaucracy. But it should be kept in mind that the purpose of the BRA is to empower disfavored groups with dignity, within the framework of the existing criminal justice system. Although a more transformative vision of the criminal justice system may be even more empowering, its full development is beyond the scope of this Note.

If the victim decides she wants to challenge the prosecutor's decision, the BRA would aid the victim by preparing a report of its investigatory findings and a victim impact statement for submission to the reviewing judge.⁵³ The victim impact statement would not only include a description of the physical and psychological harms that the bias crime has caused the individual victim, but would also describe the harmful effects such crimes generally tend to have upon the discrete group of which the individual victim was a symbol to the perpetrator. Based on the BRA's report, the judge can decide whether there was probable cause such that the prosecutor should have prosecuted the case. During this hearing the prosecutor may present the reasons she decided not to prosecute. Because the victim impact statement will have advised the judge of the danger of unconscious racism, courts will be likely to closely scrutinize the prosecutor's testimony and the written justification that the prosecutor gave the victim. The impact statements will also alert the judge to her own unconscious racism, with the hope of ensuring a fair appraisal of the victim's harms.

3. *Declaratory Judgments*

If the judge finds that there was probable cause for a prosecution and that the prosecution would have furthered the public interest, the judge could issue a declaratory judgment that the prosecutor abused his discretion.⁵⁴ For example, in *Aetna Life Insurance Co. v. Haworth*,⁵⁵ a Federal

53. As dictated by the Victims' and Witness Protection Act of 1982, Pub. L. No. 97-291, § 3, 96 Stat. 1248, 1249 (1982), victim impact statements are written statements informing the court of the impact the crime has had upon the victim.

54. A declaratory judgment is a "binding adjudication of the rights and status of litigants even though no consequential relief is awarded," BLACK'S LAW DICTIONARY 368 (5th ed. 1979). The historical attitude of the courts has been one of hostility to the notion of review of prosecutorial inaction, as demonstrated in *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied sub nom. Cox v. Hauberg*, 381 U.S. 935 (1965), and *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), yet at least one commentator has suggested that the courts' hostility appears to be poorly reasoned, *see Noll, supra* note 40, at 730-37. The major objection to judicial review is that it would violate separation of powers by usurping the executive duties of the prosecutor. But this argument does not take into account the fact that through unsupervised screening the prosecutor assumes a judicial function. Whenever the prosecutor declines to charge because of doubt as to the accused's guilt or as to the admissibility of evidence, he is in effect acting as a judge. *See id.* at 714-15. Thus, given that the prosecutor's job commingles executive and judicial functions, it follows that there ought to be less concern with judicial involvement in prosecutorial decisionmaking. Indeed, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Moreover, even the case law cited for the proposition that judicial review of prosecutorial decisions violates the separation of powers doctrine suggests that judicial review might be permissible if provided for by statute: "We will assume, without deciding, that where Congress has withdrawn all discretion from the prosecutor by special legislation, a court might be empowered to force prosecutions in some circumstances." *Powell*, 359 F.2d at 235. In addition, the constitutional grant of the executive's prosecutorial power in the take care clause, U.S. CONST. art. II, § 3, indicates that a statutory grant of judicial review would be constitutionally permissible at least for the limited purpose of granting the victim declaratory relief. The take care clause is a positive grant of power to act, not a power to refrain from acting. Because it is legally defined and not an absolute license, prosecutorial discretion is judicially reviewable. For example, the Administra-

dispute adjudicated under the Declaratory Judgment Act of 1934,⁵⁶ the Court held that a controversy did exist and that the admittance of a party's legal rights by declaratory judgment did not require an "award of process or the payment of damages."⁵⁷ Because a declaratory judgment declares legal rights arising out of a real case or controversy, a declaratory judgment is not an advisory opinion. Nor would the judge be compelling the prosecutor to act. The declaratory judgment would merely suggest that prosecution is called for, with the BRA's results from the investigation attached to the judgment. In other words, such a declaratory judgment would serve as a *signal* to a prosecutor that she ought to re-evaluate the victim's case because the judiciary has considered the case worthy enough to be deemed a legal controversy. "Having issued a declaratory judgment that a prosecutor has abused his discretion in declining to prosecute, a court would have good reason to 'assume' that the prosecutor subsequently might change his mind and satisfy his obligations under the take care clause."⁵⁸ The prosecutor would review the BRA's results and could change his mind about prosecuting. If the prosecutor still remained unpersuaded, the judge could appoint a special prosecutor.

4. *Special Prosecutor*

A special prosecutor could be utilized in a number of circumstances. When the BRA receives complaints of bias crimes perpetrated by police officers⁵⁹ and it deems the local prosecutors' close working relationship with the police force a hindrance to effective enforcement of the statute, a special prosecutor would be available. The request for a special prosecutor would be only a measure of last resort because it is assumed that the BRA would exercise reasonable judgment and not advocate prosecution of every reported case. Those cases about which the BRA feels so strongly that it would make a formal request for a special prosecutor will logically be

tive Procedure Act's statutory grant allows courts frequently to review the executive's exercise of discretion. See Noll, *supra* note 40, at 732 n.152. To accommodate whatever constitutional objections still exist, the model statute provides for a very limited judicial review of prosecutorial discretion. The use of the declaratory judgment allows the prosecutor to make the final decision on whether to prosecute. Thus, the proposed declaratory judgment infringes less on prosecutorial autonomy than does ordinary judicial review. See Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 504-06 (1988). In this way, the model statute uses narrowly tailored means to achieve a desirable result: "[T]he most effective and reliable way to protect unpopular minorities against majoritarian abuse is through the courts, not through a reliance on a [putatively] politically sensitive prosecutor." Noll, *supra* note 40, at 728.

55. 300 U.S. 227 (1937).

56. 48 Stat. 955 (1934) (current version at 28 U.S.C.A. §§ 2201-2202 (West 1982 & Supp. 1989)).

57. *Aetna Life Ins. Co.*, 300 U.S. at 241.

58. Note, *supra* note 54, at 504 (footnotes omitted).

59. Local prosecutors are often accused of covering-up such police conduct and refusing to prosecute the assaults. See, e.g., Latino Coalition for Racial Justice, Press Release (Feb. 10, 1988).

such strong cases that the local prosecutor will be publicly embarrassed if the special prosecutor secures a conviction.

The abuse of such an option, or even the appointment of a permanent special prosecutor, defeats the BRA's purpose of persuading all local prosecutors to investigate bias crimes on a routine basis, just as they do all other types of crimes. If a special prosecutor office were instituted, it would also likely be insufficiently staffed to handle all the bias crimes in a state. There is a greater potential for deterring bias crimes if the large number of routine public prosecutors in a jurisdiction were prompted to enforce the bias statutes on a regular basis. Moreover, a permanent special prosecutor would always permit local prosecutors to avoid the difficulties of enforcing bias crime statutes.

5. *Nonfeasance Suits*

As a watchdog agency, the BRA would keep track of how often the special prosecutor option was used. If individual prosecutors display a pattern of refusing to prosecute all bias crimes, the BRA could organize a class action on behalf of all those victims that were denied vindication because of the prosecutor's policy, and accuse the prosecutor of nonfeasance. A compilation of all written justifications would be a part of the BRA's investigation into nonfeasance.

Although suits for nonfeasance are a seldom used remedy for abuse of prosecutorial discretion, some statutes have provided for the removal of prosecutors from office in egregious cases.⁶⁰ Like the special prosecutor option, suits of nonfeasance will be a measure of last resort.

B. *Inclusiveness of Statute*

The proposed model statute would extend coverage to habitually disfavored or marginalized groups such as gay men and lesbian women,⁶¹ in addition to racial minorities, because of the commonality regarding motivations of irrational hatred. The coverage would be extended with the understanding that those who are members of such groups would qualify if there has been a history of violence against the discrete group, there are pervasive and well-known stereotypes about the group, or there is a resentment against the group based on a perception of economic clashes of

60. See F. MILLER, *supra* note 43, at 298-306 (1969); *State v. Winne*, 12 N.J. 152, 96 A.2d 63 (1953) (leading case upholding validity of indictment charging prosecutor with criminal nonfeasance in office).

61. Even though gay men and lesbian women are not considered a suspect class under the Federal Constitution, see *Bowers v. Hardwick*, 478 U.S. 186 (1986), states can and should go much further in protecting individual rights. See Keynote Address by Attorney Elaine Jones, Conference on Women of Color in the Law (audio tapes on file with Rutgers University Law School) (Apr. 14, 1988) (given Federal government's current reticence to advance cause of civil rights, state governments and courts must protect individual rights).

interest. The statute will also cover attacks on individuals who are perceived by their attackers to be members of a disfavored group. Even though such individuals are not actually members of disfavored groups, the harm to the disfavored group under attack is the same.⁶²

Although the model statutory definition of bias crime will not be confined solely to assaults of minority persons by white people, the statutes are written with the understanding that assaults which are motivated by arbitrary hatred are most often directed against disfavored groups for the purpose of oppression.⁶³ Not every cognizable group finds itself in such a condition of disfavor. Therefore, even though the statute is generally written to encompass any perpetrator, the BRA will more closely scrutinize bias crime allegations against a member of a disfavored group in case the prosecutor is using the statute for the purpose of further oppression. But the statute on its face would apply to a Black person's bias attack on a white person. Given this understanding, if BRA records reveal that specific prosecutors are using the statutes to *persecute* members of the disfavored groups rather than to deter racial violence, the BRA then would have standing to bring charges of malfeasance against those prosecutors. It may be that certain white victims may feel threatened by criminals who happen to be people of color, but that is a concern to be distinguished from the fear of bias motivated attacks which contributes to the oppression of disfavored groups.

BIAS CRIME MODEL STATE STATUTE

A person is guilty of a bias crime when—with the intent to harass, annoy, threaten, intimidate, or alarm another person—he: strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same, because of some immutable characteristic which the victim possesses or is perceived to possess as a member of a disfavored group.

(1) Definition—As used in this section a victim will be considered a member of a “disfavored group” if she is a member of a distinct group, if there has been a history of violence against such group, and if there are pervasive and well-known stereotypes about such group. Among the characteristics that define a “disfavored group” are: race, color, religion, ances-

62. Interview with Marlene Besterman, *supra* note 17 (bias statute in New York, N.Y. PENAL LAW § 240.30 (Consol. 1984), has been inadequate in prosecution of bias crimes, because in cases where victim is abused because of attacker's perception of victim's sexual orientation, victim's lack of membership in disfavored group only allows such attacks to be charged as “violations” rather than more serious misdemeanor or felony charges).

63. Oppression is a term used to designate conditions and experiences of subordination and injustice. Oppression involves “a system of interrelated barriers and forces which reduce, immobilize and mold people who belong to a certain group, and effect their subordination to another group (individually to individuals of the other group, and as a group to that group.)” A FEMINIST DICTIONARY 314-15 (1985).

try, national origin, and sexual orientation. A group characteristic will be considered immutable if it is so much a part of each group members' being that physical violence cannot and should not be avoided by denying possession of the trait to the attacker.

(2) Duty of the Prosecutor—When prosecutors receive cases from the police or victims, they must either prosecute the case as a bias crime or formulate a written justification for not prosecuting the case.

Copies of the written justification must be given to the victim and kept on file with the prosecutor's office and the Bias Reporting Agency instituted under provision (3) of this statute.

If prosecutors receive cases from the police or victims that *have not been classified as bias crimes*, but involve an act of violence either between distinct members of the oppressed groups detailed in provision (1) of this statute or between members of a disfavored group and white heterosexual persons, prosecutors *must* thoroughly investigate the case for the circumstances enumerated below which each individually raise the inference that the act is a bias crime:

i. uttering of racial slur(s) or statement(s) concerning the victim's membership within a disfavored group, by the perpetrator anytime before, during, or after the act of violence;

ii. relevant history of the relations between the victim and the perpetrator (i.e., whether victim is a complete stranger to perpetrator, and/or a recent arrival in residential area where attack occurred, or whether victim and perpetrator have had a long history of hostility caused by other factors).

(3) Bias Reporting Agency—The state shall establish and fund a Bias Reporting Agency (BRA)

i. which shall collect any information, records and statistics regarding bias crimes in the state;

ii. which will receive copies of all the written justifications prosecutors are required to give victims when a decision is made not to prosecute;

iii. part of whose staff shall include a pathologist/forensic scientist for autopsy purposes;⁶⁴

iv. which shall investigate cases free of cost for victims and proxy victims when those victims are given standing to challenge a non-prosecution decision by seeking declaratory judgments stating that 1) the

64. The BRA pathologist will be able to evaluate the accuracy of the state medical examiner's report and be able to conduct a new autopsy when necessary. This investigatory power will be helpful in cases of police brutality where state medical examiners have been known to falsify autopsy reports which advantage the police. For general information about such a coverup, see N.Y. Times, Apr. 11, 1986, at B4, col. 6; N.Y. Times, Oct. 30, 1985, at B4, col. 4 (when 18-year-old graffiti artist Michael Stewart was taken into custody by New York Transit Police, he sustained lethal injuries before he finally died; New York medical examiner initially issued death certificate listing ambiguous term "cardiac arrest" as cause of death; after allegations of corruption, death certificate changed to reflect choking that was actual cause of death).

prosecutor has abused her discretion not to prosecute; and/or 2) the victim has a legitimate case that should be prosecuted even though the prosecutor is not compelled to do so;

v. which shall maintain a file of all declaratory judgments the judiciary confers upon individual prosecutors.

(4) Judicial Standard for According Declaratory Judgment

i. Victim(s) may be declared to *have a right* to have their attacker(s) prosecuted if the facts presented in the BRA investigatory report establish adequate probable cause for prosecution.

ii. The prosecutor may be declared to have abused her discretion not to prosecute if her investigation of the case appears insufficient as compared with the fact finding of the BRA's investigation; or if her written justification for not prosecuting contain subtle indication(s) that unconscious racism⁶⁵ may have accounted for the decision not to prosecute.

Unconscious racism may be inferred from prosecutorial descriptions of the case as being unworthy of prosecution because the act was a mere prank and not an actual bias crime; or if the victim is characterized as not being credible; or if the prosecutor stated that prosecution of bias crime is not an effective use of the criminal justice system.

(5) Special Prosecutor—In the event that a prosecutor disagrees with the rationale of a declaratory judgment, the judiciary is empowered to appoint a special prosecutor. [Special prosecutor may also be appointed in whatever manner certain states may have already instituted.]

(6) Penalties—Bias crimes shall be punishable by either imprisonment not to exceed two years or a fine not to exceed one thousand dollars for threatened bodily injury, and ten years imprisonment or ten thousand dollars for actual bodily injury.⁶⁶ When used in conjunction with other criminal statutes, sentences may be applied consecutively.

IV. CONCLUSION

In its analysis of bias crimes, this Note has identified a number of problems which account for the nonenforcement of bias crimes. The problems include: the exclusion of disfavored groups; prosecutorial discretion; and unconscious racism. The proposed model statute attempts to ad-

65. See Lawrence, *supra* note 29, at 355-58 (1987) (proposing cultural meaning test that asks courts to interpret meaning of human behavior when judging whether something is racially discriminatory act rather than requiring proof of concrete discriminatory purpose). "[H]uman behavior must be examined in context, as it may well derive its meaning from the specific historical and cultural milieu in which it takes place." *Id.* at 369-70. See ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH LAW REPORT, HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM AND VIOLENT BIGOTRY app. A (1988) (draft of model legislation providing for penalty enhancement of various crimes which are motivated by bias). Unlike the model statute proposed in this Note, the ADL model statute focuses upon the state's duty to collect data regarding bias crimes rather than problems which arise with prosecution of bias crimes.

66. This penalty provision is the standard sentencing structure currently employed in the existing statutes described in Part Two of this Note. States should revise the sentencing options as they see fit.

dress those problems by monitoring prosecutorial discretion and empowering victims.

The myriad of problems associated with arbitrary hatred will not disappear overnight, nor will they be solved by any single innovative legal process. The creation of state criminal statutes in combination with a special Bias Reporting Agency must be used in addition to Federal remedies to be most effective. Although some commentators might criticize a statutorily-created Bias Reporting Agency because it represents too drastic a measure, it should be noted that existing prosecutorial structures have been deficient in handling bias crime prosecution. Slight modifications of existing arrangements would be futile in changing the status quo perception that bias crimes are isolated incidents that do not require widespread prosecution. As difficult as instituting a new administrative agency might be, the only way that crimes of arbitrary hatred can be opposed is by waging a full scale attack. Anything less than a comprehensive optimistic approach is a poor attempt to confront the social dilemma of bias crimes.